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UNIVERSAL TRUSTEE (MALAYSIA) BHD v. DYNAWELL CORPORATION (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ROSNAINI SAUB J
[ORIGINATING SUMMONS NO: 24-NCVC-2980-11-2011]
5 OCTOBER 2015

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CIVIL PROCEDURE: *Stay of proceedings – Application for – Order of sale – Foreclosure proceedings – Senior Assistant Registrar fixed auction date – Application for stay of foreclosure proceedings including auction – Allegation that there was interested foreign bidder – Averment that proceedings should be stayed until foreign bidder was allowed to obtain requisite consent to acquire property – Whether foreign bidder had financial capability to purchase property at or above fixed reserve price – Whether proceedings and auction should be stayed*

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LAND LAW: *Valuation report – Conflicting valuation reports – Senior Assistant Registrar ('SAR') fixed reserve price for sale of property at RM210 million in first summons for directions – Auction date fixed by SAR but vacated by plaintiff – Plaintiff applied for second summons for directions and relied on valuation report in first summons for direction – First defendant adduced valuation report that land's value was RM268 million – SAR opted for valuation report by plaintiff – Whether plaintiff's valuation report recent and current – Whether plaintiff's valuation report should prevail over first defendant's valuation report*

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The plaintiff had obtained an order for sale against a piece of land comprising the Dynasty Hotel ('the said property'). The said property was charged by the first defendant to the plaintiff as security for certain banking facilities. The plaintiff filed a summons for directions in respect of the sale by public auction of the said property ('the first SFD'). Upon hearing the first SFD, the Senior Assistant Registrar ('the SAR') fixed the reserve price for the sale of the property at RM210 million and the auction date ('the first auction'). The first defendant appealed to the judge-in-chambers against the SAR's decision on the reserve price in the first SFD but the appeal was dismissed. At the plaintiff's request, the first auction was vacated. The plaintiff subsequently filed a fresh summons for directions ('the second SFD'), and sought for a new auction date. At the second SFD, the plaintiff relied on the same valuation report produced at the first SFD. The first defendant's valuation report, on the other hand, stated that the market value of the said property was RM268 million. The SAR chose to accept the plaintiff's valuation report and fixed the reserve price for the said property at RM210 million and the auction date ('the second auction date'). The first defendant argued that the plaintiff's valuation report was outdated whilst the first defendant's valuation report was more recent. The matters that arose before the present court were (i) the first defendant's appeal against the SAR's decision in the second SFD *vide* encl. 63; and (ii) the first defendant's application to stay or, in the alternative,

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adjourn all proceedings, including the second auction, until a foreign bidder is allowed to obtain the requisite consent to acquire the said property *vide* encl. 206.

Held (dismissing encls. 63 and 206):

(1) The plaintiff's valuation report was preferred over the first defendant's. The plaintiff's valuation report had already been accepted in the first SFD, including at the appeal stage, as being properly prepared for the purpose of a foreclosure proceeding and had used the proper method of valuation. On the other hand, the first defendant's valuation report was not prepared for the purpose of a foreclosure proceeding but purely for internal management purpose only. As such, there was the possibility that the market value of the said property had been marked up for that purpose. In addition to that, it was unclear whether the first defendant's valuation report had excluded the valuation of the condominium unit or not. (para 8)

(2) There were no special circumstances to justify the proceedings in this case to be stayed or adjourned. The first defendant's averment that there was an interested foreign bidder remained unconvincing. Apart from a mere averment, the first defendant had not demonstrated that this foreign bidder had the financial capability to purchase the said property at or above the fixed reserve price. It was important for the first defendant to at least produce such evidence in respect of the alleged interested foreign bidder since it was asking the second auction to be stayed, precisely due to the said foreign bidder. The second auction should proceed as scheduled as it would be unfair to the plaintiff to further delay it. (paras 15 & 16)

Case(s) referred to:
J Raju v. Kwong Yik Bank Bhd & Anor [1994] 1 LNS 197 SC ***(refd)***
Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [2000] 6 CLJ 72 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 257(1)(d), 259(2)(c), 433B

For the plaintiff - Melisa Tai (S Ramesh with her); M/s Adnan Sundra & Low
For the 1st defendant - Mark Ho (SC Lee & Kirubakaran with him); M/s Chellam Wong
For the 2nd defendant - Zamani Ibrahim (Hanif Idris & Mohd Fadzir); M/s Hanif Idris & Assocs

Reported by Najib Tamby

JUDGMENT

Rosnaini Saub J:

[1] On 11 September 2013 the plaintiff obtained an order for sale against the subject property, which is a piece of land comprising the Dynasty Hotel ('the said property'), whereby the said property was charged by the first

defendant to the plaintiff in accordance with the National Land Code ('NLC') as security for certain banking facilities. Pursuant thereto, on 14 October 2013, the plaintiff filed a summons for directions in respect of the sale by public auction of the said property ('the first SFD'). The learned Senior Assistant Registrar ('the learned SAR') upon hearing the first SFD fixed the reserve price for the sale of the said property at RM210 million and the auction date on 14 April 2014 ('the first auction'). The first defendant's appeal to the judge in chambers against the learned SAR's decision on the reserve price in the first SFD was subsequently dismissed on 1 April 2014. However, the first auction scheduled to be held on 14 April 2014 was vacated at the request of the plaintiff.

[2] On 26 March 2015, the plaintiff filed a fresh summons for directions ('the second SFD') seeking to fix a new auction date for the sale of the said property and relied on the same valuation report as the one produced at the first SFD. At the second SFD, the first defendant produced its own valuation report on the said property stating that the market value of the said property is RM268 million. On 6 July 2015, the learned SAR upon hearing the second SFD fixed the reserve price for the said property again at RM210 million and the auction date on 6 October 2015 ('the second auction'). In other words, the learned SAR chose to accept the plaintiff's valuation report against that of the defendant's.

[3] There are two matters before this court now as follows:

(a) Enclosure 63 which is the first defendant's appeal against the decision of the learned SAR made on 6 July 2015 in the second SFD; and

(b) Enclosure 206 which is the first defendant's application to stay, or alternatively to adjourn, all proceedings (including the second auction) until a foreign bidder, PT lkrar Niaga Budiana, is allowed to obtain the requisite consent to acquire the said property as required under s. 433B of the National Land Code ('NLC').

I have heard both matters together. I have given due consideration to the submissions of learned counsel for both sides, including the case authorities cites. I will deal with encl. 63 first.

Enclosure 63

[4] This is an appeal by the first defendant against the learned SAR's decision in the second SFD, in particular in respect of the reserve price for the sale of the said property. The learned SAR has fixed the reserve price at RM210 million based on the plaintiff's valuation report dated 11 October 2013. It is the same valuation report produced and used by the plaintiff in the first SFD.

[5] The first defendant's main contention is that the court should accept the first defendant's valuation report instead of the plaintiffs. This is because the first defendant's valuation report dated 10 February 2015 is more recent and current than the plaintiff's valuation report. In other words, the first defendant contended that the plaintiff's valuation report is outdated since it is based on the value of the said property in the year 2013. As such, the first defendant averred that the reserve price for the said property should be fixed at RM268 million as per the first defendant's valuation report. Learned counsel for the first defendant referred to the case of *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors* [2000] 6 CLJ 72; [2000] 7 MLJ 253 to support his argument that the plaintiff ought to produce a fresh valuation report instead of using the old one. Learned counsel also referred to the case of *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 1 LNS 197; [1994] 2 MLJ 408 where it was held that a valuation report that was one year and nine months old is unacceptable because during that period there could either be an appreciation or depreciation of the value of the subject property.

[6] The plaintiff's position on the hand is that the court should not accept the first defendant's valuation report as the same was not prepared for the specific purpose of a foreclosure action but rather was merely prepared for internal management purpose. On top of that the first defendant's valuation report was not commissioned by the provisional liquidator of the first defendant but some third party. It is also being contended by the learned counsel for the plaintiff that the plaintiff's valuation report has been accepted twice by the court in the first SFD, ie by the learned SAR and by the judge on appeal against the SAR's decision. The plaintiff's learned counsel also referred to the High Court Practice Direction 1/2014 entitled "Prosiding Halang Tebus dan Lelongan Awam Harta Tak Alih Di Mahkamah Tinggi Malaya" where according to Item 3 of Lampiran A to the said practice direction, a valuation report for the purpose of fixing a reserve price of the subject property shall be valid for a period of two years.

[7] At the outset, I must say that the relevant provision under the NLC that is applicable in the second SFD is s. 257(1)(d) and not s. 259(2)(c). This is because the first auction was vacated, and not aborted due to no bidder. In other words, the duty of the court, and in this case the learned SAR, was to fix a reserve price being a price equal to the estimated market value of the said property. The duty of the learned SAR in the second SFD is the same as in the first SFD.

[8] Having said that, I am further of the view that when faced with two conflicting valuation reports produced one by the chargee and the other by the chargor, it is for the court then to consider which report should be more acceptable in the circumstances of the case. In our present case, I agree with

the plaintiff's learned counsel that the plaintiff's valuation report is preferable than the first defendant's. Firstly, the plaintiff's valuation report has already been accepted in the first SFD's proceedings including at the appeal stage, as being properly prepared for the purpose of a foreclosure proceeding and had used the proper method of valuation. The first defendant's valuation report on the other hand was not prepared for the purpose of a foreclosure proceeding but purely for internal management purpose only. As such there is again the possibility that the market value of the said property being marked up for that purpose. It is to be noted that the first defendant's valuation report is unclear as to whether the valuation of the said property has excluded the condominium unit or not. Secondly, the plaintiff's valuation report, though prepared in 2013, is still within the period of two years and therefore consistent with what has been stated in the High Court Practice Direction 1/2014. The first defendant has not shown any factors that could have caused the appreciation of the value of the said property within that period of two years.

[9] The two case authorities relied upon by the first defendant's learned counsel can be easily distinguished from the facts of our present case. In *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors (supra)* the valuation report was more than six years old and therefore clearly outdated. The case of *J Raju v. Kwong Yik Bank Bhd (supra)* was decided before the High Court Practice Direction 1/2014 is issued.

[10] It is therefore my considered view that the reserve price of the said property should be based on the plaintiff's valuation report.

[11] In the premises and based on the reasons stated, I hereby dismissed the first defendant's appeal in encl. 63 with costs of RM5,000 to be paid by the provisional liquidator to the plaintiff.

Enclosure 206

[12] This is the first defendant's application to stay the proceedings in this case, including the second auction scheduled on 6 October 2015. It is the first defendant's averment that there is an interested foreign bidder, PT Ikrar Niaga Budiana, that is interested in taking part in the public auction of the property, and that the foreign bidder needs to obtain the requisite consent under s. 433B of the NLC before it can participate in the bidding process. It is also the first defendant's case that the proclamation for sale was furnished to them only in September 2015 and there is insufficient time for the first defendant to advertise the same overseas.

[13] For the record, the learned SAR's order in the second SFD allow for the first defendant to advertise, at its own costs, the proclamation of sale in foreign countries in the hope that it may attract interest from foreign parties to participate in the second auction. However, the learned SAR's order came

with a proviso, that is, if the first defendant failed to publish such advertisement overseas, such failure shall not affect the scheduled auction that was fixed on 6 October 2015. I think the learned SAR's order was clear in its intent in that the second auction is to be carried out irrespective of whether the foreign advertisement is done or not. In other words, the liberty given to the first defendant to advertise the proclamation of sale in foreign countries should not be used as a reason to delay the upcoming public auction of the said property.

[14] Further, while the first defendant is complaining that it was only furnished with the proclamation of sale in September 2015 and therefore has not been given sufficient time to advertise the same overseas, it has nevertheless not taken any immediate step at all to do the same. There is no evidence that the first defendant has put up the advertisement immediately after it has received the proclamation of sale. As such, and based on the history of previous unsuccessful attempts by the first defendant to delay and stop the sale of the said property, this court has the impression that this application is another afterthought attempt to prevent the plaintiff from enforcing its charge over the said property.

[15] In any event, if we look closely at the prayers in encl. 206, the purpose of the stay of proceedings sought by the first defendant is to give time to the alleged interested foreign bidder to obtain the consent under s. 433(B) of the NLC, and not because the first defendant has insufficient time to advertise the proclamation of sale overseas. In respect of this foreign bidder, I agree with the plaintiff's learned counsel that apart from a mere averment, the first defendant has not demonstrated that this foreign bidder has the financial capability to purchase the said property at or above the fixed reserve price. I think it is important for the first defendant to at least produce such evidence in respect of the alleged interested foreign bidder since it is asking for the second auction to be stayed precisely due to the said foreign bidder. As it is the first defendant's averment that there is an interested foreign bidder in respect of the said property remained unconvincing.

[16] Overall, I find that there are no special circumstances to justify the proceedings in this case to be stayed or adjourned. I am of the view that the second auction on 6 October 2015 should proceed as scheduled. It would be unfair to the plaintiff to further delay the said public auction.

[17] In the premises, I hereby dismissed the first defendant's application in encl. 206 with costs of RM5,000 to be paid by the provisional liquidator to the plaintiff.